immediately, which the Commission has already determined provides a lack of parity. See South Carolina Order ¶ 168. This ability is important to CLECs because, without it, they have to wait for the FOC to learn what the actual due date is -- and, as discussed, infra, that could take a considerable amount of time because of delays in receiving FOCs, batch processing, and manual processing. In addition, competing carriers continue to suffer discrimination because LENS, the pre-ordering interface which most of them use, cannot be integrated with CLECs' own systems or with BellSouth's ordering interface.[25]

Similar defects, also identified by the Commission but unremedied by BellSouth, plague BellSouth's ordering and provisioning interfaces. Most notably, carriers report that their orders fall out for manual processing with a much greater frequency than BellSouth's, a plainly discriminatory condition that the Commission has urged ILECs to remedy.[26] And carriers also

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[24] (...continued)
dates to its customers at the pre-ordering stage than did CLECs"); Sprint Comments at 32-33 ("BellSouth has not fixed" problems with due dates, which "gives BellSouth customer representatives a significant advantage over their CLEC counterparts").

[25] South Carolina Order ¶ 162; see AT&T Comments at 41; e.spire comments at 31-32 ("CLECs still are faced with expensive, time-consuming and error-plagued dual entry not faced by BellSouth's own retail operations"); Sprint Comments at 29-31 (the "inefficient" dual entry process "increases the risk of human error" and "increases delays in response times"); Intermedia Comments at 11; MCI Comments at 56-60 & Green Decl. ¶¶ 44-52. The inadequacy of BellSouth's Common Gateway Interface ("CGI") as a means of integrating LENS is confirmed by the experience of MCI, which was unable to use CGI successfully even for the limited purpose of retrieving CSR information in a form that could be used to populate an order for the service -- and those problems with parsing CSR data were also experienced by Albion, which developed a CGI prototype for BellSouth. See MCI Comments at 56-57 & Green Aff. ¶¶ 49-52. Similarly, the comments of Omnicall show that, contrary to the suggestion of BellSouth that Omnicall has successfully implemented CGI (Stacy Aff. ¶¶ 24, 113), Omnicall has not in fact implemented CGI and, in any event, has not succeeded in its attempts to develop a method of its own to transfer useable date from LENS into its own systems. Omnicall Comments at 2; AT&T Bradbury Aff. ¶ 160 n.77.

[26] South Carolina Order ¶ 107; Louisiana Order ¶¶ 24-25; see DOJ Eval. at 30-31 (BellSouth's (continued...)

report that neither order rejection notices nor order completion notices are being provided on a fully electronic basis or in a timely manner.[27] Carriers have also set forth evidence that firm order confirmations are not being provided at parity with BellSouth.[28] Finally, several commenters have noted that BellSouth still has not even begun to provide an end-to-end electronic ordering process for UNE-combinations; although a few UNEs can be ordered electronically, BellSouth's systems are patently insufficient to permit CLECs even to attempt large-scale entry using UNEs or UNE-combinations.[29] This failure in particular has a significant effect in limiting competition for local services in BellSouth's region.

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[26] (...continued)
flow-through "data still raises serious concerns" and "at a minimum" indicates that CLECs' flow through rates are "substantially below BellSouth's own rates"); AT&T Comments at 42; MCI Comments at 48-49 & Green Decl. ¶¶ 158-59; ALTS Comments at 15-16 & Rozycki Aff. ¶¶ 8-9; CompTel Comments at 8; e.spire Comments at 30; KMC Comments at 14-15; TRA Comments at 26. Moreover, the lower flow-through rates understate the lack of parity because CLECs' orders include mostly "simple" orders like POTS; few complex services are included because BellSouth's OSS do not even allow CLECs to place orders electronically for most complex services (and no complex service can be ordered electronically on an end-to-end basis). See DOJ Eval. at 31; MCI Comments at 49 n.39.

[27] Louisiana Order ¶¶ 33-34; South Carolina Order ¶ 139; AT&T Comments at 33; KMC Comments at 16, 20 & Pipes Aff. ¶¶ 5-6, 13 ("BellSouth does not routinely provide KMC timely notice" of order rejections and the "notices it does provide are often sent to the wrong KMC office;" BellSouth "never issues order completion notices to KMC").

[28] Louisiana Order ¶ 38; South Carolina Order ¶ 122-24; see AT&T Comments at 33; CompTel Comments at 9 (describing "substantial delays in obtaining due dates"); KMC Comments at 11-13, Davis Aff. ¶ 11 & Pipes Aff. ¶ 13 ("BellSouth frequently does not provide notification to KMC that an order has been received . . . until after the order has been completed"); e.spire Comments at 30.

[29] AT&T Comments at 44; e.spire Comments at 33 ("BellSouth has not demonstrated any capacity to provide electronic OSS for . . . UNEs"); MCI Comments at 42, 50-51 ("BellSouth fails to present even a single piece of evidence of any sort showing that CLECs can successfully transmit UNE orders"); Sprint Comments at 35-36 & Closz Aff. ¶¶ 29 ("[U]se of BellSouth's OSS interfaces to order UNEs has proven unwieldy").

In addition, the comments of the Justice Department, AT&T, and Time Warner demonstrate that BellSouth's interfaces for repair and maintenance are fundamentally flawed. As the Department concluded, BellSouth's data causes "concern" that it is not providing "timely, accurate and nondiscriminatory" repair and maintenance service, which is "critical to competition."[30] The performance data BellSouth has released shows that trouble dispatches for resold business orders took "nearly 40% longer than for BellSouth's own corresponding retail business orders" and that "repeat" reports for CLECs "appear[] to be significantly worse than for BellSouth's retail business." DOJ Eval. at 34-35.[31]

These and other defects show that, contrary to the statement of the LPSC (at 4-5), BellSouth has not "become proficient in the operation of the OSS." To the contrary, the comments from CLECs of all sizes prove that BellSouth has completely failed to show that its OSS are "actually handling current demand" or that its systems are "operationally ready" for additional volumes of orders. Ameritech Michigan Order ¶¶ 136-43. In fact, the record is replete with examples not only of poorly functioning OSS, but of BellSouth's failure to remedy the problems CLECs identify.[32] Thus, Intermedia complains that it "continue[s] to experience

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[30] DOJ Eval. at 34; see also AT&T Comments at 44 & Bradbury Aff.; Time Warner Comments at 11-15. Time Warner notes that BellSouth's "consistent failure" to meet a two hour benchmark for repair service that BellSouth itself set has resulted in "customer complaints" that customers receive "superior repair service from BellSouth as a BellSouth end user customer than as an end user customer" of Time Warner. Id. at 14-16.

[31] As for billing, BellSouth has failed to provide accurate bills to CLECs, usage data for flat rate calls, or accurate daily usage feeds for CLECs to use in billing end users. See AT&T Comments at 44-45; Omnicall Comments at 4-5; Sprint Comments at 36-37 & Closz Aff. ¶ 81. As to providing bills to CLECs, Sprint (id.) reported that "[i]n nearly two years of doing business as a CLEC in Florida, Sprint has not yet received correct billing from BellSouth for any month."

[32] This assumes, of course, that CLECs can in fact contact BellSouth to identify such problems: (continued...)

major problems with BellSouth's order processing" and that "[m]any LSRs are either delayed or lost," which forces Intermedia to "spend considerable amounts of time tracking its orders, making follow-up calls, and reissuing its orders many times over," only to have BellSouth try to "shift[] the blame to Intermedia when problems relating to BellSouth's OSS are brought up." Intermedia Comments at 12.

Likewise, KMC states that for fax orders that it submits, it "has adopted [a] practice of follow up telephone calls" to BellSouth's Service Center "to confirm that the fax was received." KMC Comments at 11-12 & Davis Aff. ¶ 3; Pipes Aff. ¶ 13. Such a practice is necessary because KMC "does not regularly receive FOCs on a timely basis" and because, otherwise, BellSouth's representatives will "claim that they did not receive the order," which has resulted in KMC having to fax its orders "two or three times" before BellSouth confirmed receipt.

For larger carriers, Sprint reports that it has "experienced numerous difficulties in ordering and provisioning UNEs from BellSouth." Sprint Comments at 36 & Closz Aff. ¶¶ 56-80. And MCI reports that it "has completed one stage of testing of UNE ordering," which "revealed exactly the sorts of problems one would expect in an interface in early testing." MCI Comments at 54. AT&T experienced similar frustrating results in attempting to send orders for UNE-combinations via EDI. See AT&T Comments at 46-47 & Bradbury Aff. ¶¶ 276-77. AT&T also noted several significant problems with BellSouth's systems that have hindered its efforts to introduce AT&T Digital Link, a facilities-based service for large business customers. AT&T Comments at 36-38. These include an inability to order both complex directory listings

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[32] (...continued)
it appears that this may not be true, as shown by the experience of a State Communications representative who was placed on hold by the BellSouth Service Center for three and half hours, only to be disconnected, and ultimately unable to place his complaint. State Comments at 2-3.

and any additional migrations of customer lines to AT&T after the first order -- services that are desired by the bulk of business customers.[33]

While the performance data provided by BellSouth alone show that its OSS are not operating at parity, the experiences reported by all types of CLECs demonstrate that BellSouth's data, if anything, understate the degree to which BellSouth's interfaces remain nowhere near being "operationally ready." Accordingly, the Commission should once again reject BellSouth's application on this ground.

C. BellSouth Has Not Provided The Performance Measurements Needed To Establish Nondiscriminatory Performance For CLECs

Apart from BellSouth's discriminatory performance today in providing access to its OSS, the commenters also demonstrate that BellSouth's performance data remains incomplete and inadequate.[34] As the Department of Justice sums up BellSouth's evidence: "BellSouth's present showing is inadequate . . . [because of] the absence of data measuring some important dimensions of performance," as well as other "deficien[cies] in several areas," including "incomplete data, and insufficiently disaggregated data." DOJ Eval. at 27-29.

Thus, the comments show that BellSouth's performance data continue to be inadequate in at least four important respects. First, performance data are still missing for several

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[33] AT&T Comments at 36-38; see also MCI Comments at 51 ("BellSouth's EDI interface also does not include the ability to order complex directory listings, the type of listing desired by most business customers"); id. at 50 ("all UNE orders for split accounts must be transmitted manually," which causes manual processing for "a type of order that MCI projects could amount to more than 50% of its orders").

[34] DOJ Eval. at 27-39; AT&T Comments at 48-50 & Pfau-Dailey Aff.; ALTS Comments at 11-13; CompTel Comments at 10-12; e.spire Comments at 27-29; Hyperion Comments at 7-9; Intermedia Comments at 13-14; MCI Comments at 30-38; Sprint Comments at 39-40 & Closz Aff. ¶¶ 33-49; Time Warner Comments at 4-10; WorldCom Comments at 11-16.

significant performance measures.[35] Second, BellSouth still fails to provide essential comparative data showing its own performance of the same or analogous functions for its own retail operations.[36] Third, the level of disaggregation at which BellSouth's data is reported continues to be inadequate, both as to geographic area and as to product or service category.[37] Fourth, BellSouth has failed to provide any methodology by which the Commission could determine that BellSouth's performance for CLECs is nondiscriminatory, nor has BellSouth provided the necessary statistical information that would be required to make that determination.[38]

Several commenters also note that BellSouth has refused to agree to any self-executing enforcement mechanism to ensure compliance with its statutory obligation to provide nondiscriminatory performance for CLECs.[39] The need for self-executing enforcement

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[35] DOJ Eval. at 30, 34; AT&T Comments at 48-49 & Pfau-Dailey Aff. ¶¶ 22-29, 38-41, 52-53, 57-58, 68; e.spire Comments at 33-34; MCI Comments at 38, 55; Sprint Comments at 39-40 & Closz Aff. ¶¶ 33-35.

[36] DOJ Eval. at 28; AT&T Comments at 49 & Pfau-Dailey Aff. ¶¶ 24, 30-37, 43-47; CompTel Comments at 7, 11; e.spire Comments at 34; Intermedia Comments at 13; MCI Comments at 55; Closz Aff. (Sprint) ¶¶ 42-44; WorldCom Comments at 15.

[37] DOJ Eval. at 34 & n.69; Pfau-Dailey Aff. ¶¶ 94-97; ALTS Comments at 12: CompTel Comments at 7, 11-12; e.spire Comments at 35; Hyperion Comments at 7-8; MCI Comments at 38-39; Sprint Comments at 39 & Closz Aff. ¶¶ 36-39; WorldCom Comments at 11-12, 14-16.

[38] DOJ Eval. at 35-36 & n.70 ("BellSouth does not carry its burden by simply producing data and asserting that it shows adequate performance: BellSouth needs to discuss the results and, where apparent discrepancies exist, explain them. . . . Having abandoned the use of statistical process control, BellSouth needs an alternative method . . . by which it can be determined whether the reported data reflects adequate or inadequate performance"); AT&T Comments at 49 & Pfau-Dailey Aff. ¶¶ 60-63; Sprint Comments at 39-40 & Closz Aff. ¶¶ 40-41.

[39] DOJ Eval. at 39 (BellSouth has not committed itself "to any enforcement provisions to remedy inadequate performance"); Pfau-Dailey Aff. ¶ 64; ALTS Comments at 13; Hyperion Comments at 9; Intermedia Comments at 14; MCI Comments at 31-37.

mechanisms is shown by the comments of Time Warner, which negotiated a set of contractual performance standards with BellSouth as a part of its interconnection agreement[40] -- a commitment that BellSouth touted in its prior applications.[41] Yet in clear breach of that agreement, BellSouth has failed to provide Time Warner with the required monthly performance reports. Time Warner Comments at 5-11. Without any self-executing enforcement mechanism, Time Warner was relegated to an ADR process, with the result that "fully eleven months after" obtaining BellSouth's commitment to provide a set of performance measurements, Time Warner has received only "one of the five categories" of performance data promised by BellSouth. Id. at 7.[42] Furthermore, the data BellSouth finally provided for that category showed substantially poorer performance for Time Warner than the agreed-upon minimum performance standard in Time Warner's interconnection agreement. Id. at 11-16.

On August 19, 1998, the LPSC adopted its staff's recommendation to adopt a revised set of performance measurements, which consisted of BellSouth's proposal with various modifications proposed by CLECs and the LPSC staff. Many of the staff's changes -- which the staff found to be "necessary to ensure nondiscriminatory treatment as required by the [1996] Act"[43] -- confirm the deficiencies in BellSouth's performance measurements that have been

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[40] Time Warner Comments at 4-5 & Marek Aff.

[41] See, e.g., Stacy Louisiana Performance Measurements Aff., ¶ 19 ("BellSouth will produce measurement reports for Time Warner . . . as specified in their contract") & Ex. WNS-4.

[42] As the Department of Justice makes clear, the filing of a formal or informal complaint with the Louisiana Commission -- the very process upon which the LPSC relies (see LPSC Comments at 6) -- does not provide a practical or effective means for CLECs to remedy a breach of BellSouth's statutory obligation to provide nondiscriminatory performance. See DOJ Eval. at 39 n.76.

[43] LPSC Staff Final Recommendation at 3.

identified by the commenters in this case. For example, the staff found that "further disaggregation is necessary" with respect to both the product and geographic level of reporting of BellSouth's performance data. LPSC Staff Recommendation at 4-10. The staff also directed that in those instances where no analogous retail service exists, special studies will need to be conducted to establish performance benchmarks based on BellSouth's performance of analogous functions for itself. Id. at 12-14. Further, finding that "the application of a statistical analysis to performance measurement data is necessary . . . in determining whether BellSouth is meeting the statutory requirements," the staff directed BellSouth to perform a statistical analysis of its performance data using three different statistical tests, including the modified z-test endorsed by AT&T and other CLECs. Id. at 15-19. Finally, the staff found that CLECs must be given "reasonable auditing rights" with regard to BellSouth's data and that enforcement mechanisms for nonperformance will need to be established. Id. at 19-20. Such enforcement mechanisms, plus further refinements in the way BellSouth's proposed measurements are defined and how CLEC will be given access to BellSouth's raw data, are to be addressed in future workshops. Id. at 3-4, 8, 21. The staff decision, now adopted by the LPSC, therefore clearly confirms that BellSouth's performance measurements, as presently proposed by BellSouth, are not capable of establishing BellSouth's claim that it is providing nondiscriminatory performance for CLECs.

Moreover, the staff decision adopted by the LPSC addresses only the future reporting obligations of BellSouth under its Louisiana SGAT. It does not address any of the performance data that have been introduced by BellSouth in this case -- the data on which BellSouth's claim of nondiscriminatory performance for CLECs ultimately depends. As the comments clearly demonstrate, those data (or lack of data) show that "BellSouth's performance is deficient in

several areas."[44] In sum, BellSouth has failed to support its claim that CLECs are receiving nondiscriminatory performance with appropriate performance data.

D. BellSouth Has Not Provided Interconnection and Unbundled Network Elements at Cost-Based, Forward-Looking Prices

AT&T demonstrated in its opening comments that the only connection between the forward-looking economic cost methodology endorsed by the Commission (and other regulators nationwide) and the more than 400 BellSouth interconnection and network element charges approved by the LPSC is the ill-fitting "forward-looking" label that BellSouth and the LPSC affixed to those charges. Even the most cursory analysis -- indeed, mere reference to BellSouth's own testimony and briefs -- makes clear that those charges, in fact, are impermissibly backward-looking in virtually every critical respect. The underlying BellSouth cost studies (and hence the approved rates derived from those studies) reflect architecture, technology, and costs based, not on efficient forward-looking practices, but on BellSouth's own past practices during the monopoly era. That is the very antithesis of forward-looking pricing, and it is a simple fact that, in endorsing BellSouth's backward-looking approach, the LPSC erected rate barriers that not only violate the plain terms of the Act, but foreclose any significant network element-based local competition in Louisiana.

As a general matter, the Department (at 19) agrees both that: (i) the Commission should generally insist on adherence to a "forward-looking economic cost" standard that is "reasonably applied;" and (ii) there can be no reasoned finding that BellSouth's Louisiana prices meet that

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[44] DOJ Eval. at 28-35. See also id. at 27 (BellSouth performance data shows "poor or inadequate performance" for CLECs); Pfau-Dailey Aff. ¶¶ 65-87; ALTS Comments at 15-16; CompTel Comments at 8-10; e.spire Comments at 29-30; KMC Comments at 13-15; MCI Comments at 48-50 & Green Aff. ¶ 151; Closz Aff. (Sprint) ¶¶ 45-49; Time Warner Comments at 11-16.

standard. To the contrary, BellSouth's pricing suffers from "deficiencies that could seriously impair the ability of efficient competitors to compete using unbundled network elements." Id.

The Department also confirms AT&T's specific rate concerns in three respects. First, the Department properly questions whether potential competitors "are being competitively disadvantaged by unreasonably high prices" for unbundled switching and vertical features -- more than $10/month for a switch port and vertical feature functionality alone. Id. at 26. As the Department notes, other states, including states within BellSouth's own region, have authorized charges of only "roughly one-quarter" of this amount. Id. at 24. Moreover, it is not enough that the LPSC staff consultant "rejected some of BellSouth's cost assumptions," producing a modest reduction in the proposed prices; rather, as the ALJ recommended -- and as the consultant herself openly conceded -- further analysis was clearly necessary. Id. at 25 (emphasis added). Again, however, the LPSC simply "rejected [its ALJ's] recommendation without explanation," and later affirmed that decision on reconsideration "without any discussion on the merits." Id.

Second, BellSouth's collocation charges are likewise manifestly inconsistent with the requirements of the Act. "BellSouth has again failed to demonstrate that its charges for space construction can be justified on the basis of a procompetitive, forward-looking, cost-based methodology" and BellSouth "offers no prices [at all] for a significant component of physical collocation. DOJ Eval. at 22. As the Department aptly notes, that is an unmistakable recipe for "unreasonable prices and drawn-out negotiations that may deter or delay entry." Id. at 24. And, again, the LPSC's decision exhibits all of the hallmarks of arbitrary action, including a "summary decision not to use the forward-looking cost model recommended by the LPSC's ALJ." Id. at 23.

Third, the LPSC's acceptance of "BellSouth's proposal to retain permanent statewide geographically averaged UNE prices" will, contrary to the Act's requirements, "produce above-cost prices for unbundled loops in densely populated areas." Id. at 20-21. As the Department notes, the LPSC endorsed averaged loop rates "without offering an explanation or justification" and "despite the LPSC ALJ's recommendation that Louisiana should [as the Act mandates] adopt geographic deaveraging." Id. at 20. As a result, the approved loop rates stand as a clear and substantial "barrier to efficient competition." Id. at 22.

Apart from these three specific problems, however, BellSouth's permanent UNE prices are not based on forward-looking costs but on cost studies that were backward looking in many crucial respects. The Department therefore properly recognizes that a forward-looking methodology is of no use unless it is "reasonably applied to the data." DOJ Eval. at 19. And the Department further notes, correctly, that "there are other significant outstanding disputes in Louisiana about BellSouth's non-recurring charges and loop prices." Id. at 19 n.37. These "disputes" also constitute grounds for finding checklist noncompliance. In addition, however, the Department also observes, in a footnote, that "[i]n most [other] respects . . . the LPSC's pricing decisions, and its reasoned explanation of those decisions, are consistent with the Department's focus on pro-competitive pricing principles." Id. at 19 n.37 (emphasis added). This unexplained statement should not be taken as a serious endorsement of any of the LPSC's other pricing decisions, however, for several reasons. First, the LSPC gave no explanation for any of its pricing decisions, much less a reasoned one that could justify a finding that any of the hundreds of approved charges are consistent with pro-competitive pricing principles. Second, the LPSC could not have offered a reasoned justification of those charges because, as AT&T demonstrated in its opening comments, all of the approved charges are indelibly marked with

the BellSouth cost studies' backward-looking focus, a flaw that was not -- and could not have been -- corrected by the LPSC staff consultant's tinkering with generic inputs to those studies.

Indeed, one need look no further than the Department's own comments to conclude that the Department's seeming endorsement of an undefined subset of BellSouth's rates deserves no more weight than the footnote placement to which the Department relegated it. The LPSC's approval of the hundreds of interconnection and network element charges reflects the very same flaws that the Department finds fatal with respect to the LPSC's treatment of averaged loop, collocation and vertical features rates. In both cases, the LPSC scrapped entirely the well-supported recommendations of its ALJ and instead endorsed BellSouth's proposals (with the staff consultant's limited adjustments) -- all without a single word of analysis or comment. The Department's attempt at explaining this inconsistency -- with its focus on whether appropriate forward-looking principles have been announced, id. n.37 -- not only fails to do so, but actually makes matter worse. If the Commission were to be satisfied with a state commission's recital of a forward-looking oath, regardless of the approved rates' actual compliance with forward-looking principles, then the checklist rate requirements would be hollow indeed. But, of course, labels do not trump fact under any reasonable construction of the Act, as the Department itself recently made clear: "Of course, the label attached to a particular methodology is not determinative: it is the substance that counts." Prehearing Comments of the Department of Justice, Docket No. D97.5.87 (Montana PSC, filed July 30, 1998).[45]

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[45] The Department's equivocal (and largely unexplained) statement that a "variety" of "forward-looking" methodologies could be used to derive "competitively appropriate" prices (at 19) may also be inadvertently misleading. As the Commission has emphasized, the term "forward-looking" has significant content derived from consensus on core economic principles and decades of regulatory practice. At an absolute minimum, "[f]orward-looking cost methodologies . . . are intended to consider the costs that a carrier would incur in the future," Local Competition (continued...)

In sum, the Department's comments properly confirm that BellSouth has failed to meet its burden of demonstrating that it offers appropriately cost-based rates for interconnection and all network elements -- the approved loop, collocation and switching charges are not remotely forward-looking. Moreover, notwithstanding the Department's footnoted observation, there is no legitimate basis upon which to conclude that BellSouth succeeded in meeting its burden with respect to even a subset of the approved charges.

E. BellSouth Has Not Implemented Other Checklist Items

No commenter disputes that, as the Comments of AT&T demonstrated, BellSouth is not providing numerous other checklist items, including nondiscriminatory access to interconnection, number portability consistent with the Commission's regulations,[46] white pages directory listings, nondiscriminatory access to directory assistance data, and nondiscriminatory access to poles, ducts, conduits and rights of way. AT&T Comments at 59-63, 69-70. On each of these items as well, BellSouth's checklist noncompliance compels denial of its application.

The commenters also showed that BellSouth is not complying with its obligations to pay reciprocal compensation by withholding payment to CLECs for traffic terminated to internet and other enhanced service providers ("ESPs"). Ameritech, however, contends that BellSouth and other ILECs may disobey that obligation based on their view that such traffic is not local traffic.

[45] (...continued)
Order ¶ 683, and not, as BellSouth (and now the LPSC) would have it, "an analysis of available technology as of the date BellSouth placed equipment into service." Final Recommendation at 19.

[46] In particular, AT&T concurs with the views of Sprint (at 54-56) that BellSouth's "rates for INP shift all incremental costs to competitive carriers, [while] BellSouth pays nothing." The Commission's rules and the Act plainly requires such costs to be "borne by all telecommunications carriers on a competitively neutral basis," (§ 251(e)(2)), and therefore BellSouth is not in compliance with the checklist until it shares the cost burden.

Ameritech Comments at 9-13. Ameritech acknowledges that state commissions have uniformly found that traffic terminated to ESPs is subject to reciprocal compensation (id. at 9), and that the Commission itself on "numerous" occasions has not required ESPs to pay access charges (id. at 11-12). Ameritech thus argues that BellSouth and other ILECs may unilaterally define the scope of their obligation to pay reciprocal compensation, based on their view that the Commission's regulatory treatment of ESPs is mistaken.[47] However, until the Commission changes its views, ESP traffic must be treated as local traffic, and the Commission should not allow ILECs to evade their duty to pay reciprocal compensation on such traffic.[48]

The commenters also showed that BellSouth is not complying with its obligation to allow CLECs to resell its services because it still imposes discriminatory conditions on contract service arrangements ("CSAs"). Although the LPSC notes that it now requires "a wholesale discount of 20.72% [to] apply to CSAs," it apparently believes that this change alone is sufficient to bring BellSouth into compliance with the Act and the Commission's prior orders. LPSC Comments at 3-4. But as shown by AT&T, BellSouth still refuses to allow CLECs to resell a CSA except to the customer for which the CSA was developed or to permit resellers to aggregate the traffic of their multiple end users to qualify for the volume discounts offered in BellSouth's CSAs. AT&T Comments at 71-73. As with BellSouth's refusal to provide any discount on CSAs, which this Commission twice struck down, South Carolina Order ¶ 215; Louisiana Order ¶ 64,

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[47] Ameritech suggests (at 13) that the Commission must treat such traffic as outside reciprocal compensation obligations because "[t]he very fact that the Commission has asserted jurisdiction over ISP traffic is proof that a dial-up connection to an ISP is not local traffic." As AT&T showed (at 68 & n.23), however, there is a valid distinction between the Commission's jurisdiction over interstate traffic, and its substantive regulatory treatment of such traffic.

[48] Although AT&T believes that the Commission ultimately should change its prior holdings and require ESPs to pay a cost-based access charge, see AT&T Comments at 69 & n.25, the Commission has not yet done so.

these conditions are "presumptively unreasonable" (id.) resale restrictions that "impair[] the use of resale as a vehicle for competitors to enter BellSouth's market." South Carolina Order ¶ 215. Such conditions also unlawfully discriminate against resellers because (i) in contrast to other BellSouth customers, resellers are unable to satisfy eligibility conditions based on their usage at multiple locations, and (ii) BellSouth is able to market CSAs to any subscriber or group of subscribers, while CLECs are limited to reselling CSAs to a single customer.

For all these reasons, the Commission should find that BellSouth is not complying with these additional checklist obligations.

II. BELLSOUTH HAS NOT OTHERWISE SATISFIED "TRACK A" IN LOUISIANA

Although BellSouth's pervasive checklist noncompliance is the most significant factor impeding the development of meaningful local competition, the Commission should also reject BellSouth's claims that its application qualifies under Track A of section 271 because "competing providers" are present in Louisiana and are providing consumers with a viable "commercial alternative to the BOC." Ameritech Michigan Order ¶ 75; SBC Oklahoma Order ¶ 60. The comments make plain that there is no such competing provider and that BellSouth has not yet met the requirements of Track A.[49]

[49] AT&T Comments at 73-78; ALTS Comments at 1-11; CompTel Comments at 21-29; e.spire Comments at 6-13; Intermedia Comments at 3-6; KMC Comments at 2-8; MCI Comments at 1-11; Sprint Comments at 3-25; TRA Comments at 11-24; WorldCom Comments at 5-11.

1. First, the comments confirm the conclusion, drawn from BellSouth's own data, that no wireline carrier serving residential customers is predominantly facilities-based, and therefore that no carrier qualifies for Track A under any reasonable standard.[50]

Thus, for residential customers, the comments show that no CLEC in Louisiana serves any residential customer over its own facilities. KMC, the only carrier that BellSouth even claimed was providing facilities-based residential service (Br. 5-6), expressly affirms that "KMC does not provide facilities-based service to any residential customers in Louisiana." KMC Comments at 3-4 & Register Aff. ¶ 3. This complete absence of any facilities-based residential service is enough, under the Act, to preclude BellSouth from proceeding under Track A, because the Act requires that a Track A application show that there is a "competing provider[]" to both "residential and business" subscribers. § 271(c)(1)(A) (emphasis added).[51]

But U S WEST (Comments at 4-5), like BellSouth, contends that BellSouth qualifies for Track A under the Department of Justice's proposed test.[52] As the Department explains, under its test, a provider that is predominantly facilities-based "as a whole" qualifies as a competing

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[50] See AT&T Comments at 73-76; ALTS Comments at 1-2; CompTel Comments at 22-27; e.spire Comments at 6-11; Intermedia Comments at 4-5; KMC Comments at 2-4; MCI Comments at 2-6; Sprint Comments at 5-12.

[51] See AT&T Comments at 73; ALTS Comments at 3-5; CompTel Comments at 24-27; e.spire Comments at 8-9; MCI Comments at 3 n.5; Sprint Comments at 6-9; TRA Comments at 13-14; WorldCom Comments at 5-6.

[52] The LPSC does not state its view whether the wireline carriers relied on by BellSouth satisfy Track A, but it does claim that there has been significant "growth in competition" since BellSouth's initial 271 application was filed. LPSC Comments at 7-8. For purposes of qualifying under Track A, however, that growth is irrelevant unless there are predominantly facilities-based carriers to both business and residential customers. Moreover, as the Justice Department points out (at 8 n.14), the growth in competition from CLECs is in fact easily outweighed by the growth in BellSouth's access lines, which grew by 89,000 in 1997 alone, proving that its monopoly over local services persists.

provider for Track A, even if that provider is not predominantly facilities-based for both business subscribers and residential subscribers. DOJ Eval. at 7-8 n.13.[53] As AT&T and other commenters showed, BellSouth does not qualify even under this lenient test, which is inconsistent with the Act. As the comments explain, no CLEC is predominantly facilities-based even as a whole -- nor indeed, to business subscribers as a class. Thus, KMC states that it provides facilities-based service to "less than 30 business customers" and resells BellSouth's services to under "200 customers, the vast majority of whom are business customers." KMC Comments at 4 (emphasis added). KMC is therefore not predominantly facilities-based for business customers, nor is any other CLEC. See AT&T Comments at 74 & n.27. Accordingly, under even the Department of Justice's lenient test, no wireline carrier is predominantly facilities based as a whole, and thus cannot qualify as a "competing provider" under Track A.

2. Apart from BellSouth, only U S WEST claims (at 6) that PCS providers in Louisiana today can properly be considered facilities-based "competing providers" for purposes of Track A.[54] Many other commenters expressly reject that view, and show that PCS service is still not a valid substitute for BellSouth's wireline services, and therefore that PCS carriers are not "competing providers" under Track A.[55]

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[53] DOJ thus confirms (at 7-8 n.13) that BellSouth "misread" DOJ's prior filings when BellSouth claimed (Br. 7) that it could satisfy the Department's test by combining a facilities-based provider to business customers with a smaller residential reseller.

[54] Ameritech makes a more limited argument, claiming that PCS providers are providing "telephone exchange service" under section 3(47)(A) of the Act. Ameritech Comments at 2-3. But because PCS providers today cannot be considered "competing providers," see infra, the Commission need not address Ameritech's argument. Even if Ameritech were correct, the Commission has discretion in determining when, if ever, PCS qualifies as "competing." See Louisiana Order ¶ 73.

[55] E.g., AT&T Comments at 76-78; MCI Comments at 6-11 ("Today, PCS is not an effective (continued...)

Both the Commission's prior findings regarding PCS and the extensive record developed in this proceeding show that PCS is not a substitute today for wireline services. Thus, as many comments point out, the Commission has repeatedly found that "it is too early to state that broadband PCS providers' offerings might be perceived as a wireline substitute."[56] Moreover, commenters offered numerous reasons why PCS services resemble and compete with cellular services, rather than with ILECs' wireline offerings. These include the mobility of cellular and PCS,[57] the pricing of those services,[58] and the differing functionality and technology of mobile and wireline services.[59]

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[55] (...continued)
substitute for local wireline service"); Sprint Comments at 12-25 ("The future potential of PCS to offer a viable choice to local telephony has not yet been actualized or proven"); see also CPI Comments at 16-22; e.spire Comments at 11-13; ALTS Comments at 6-11; TRA Comments at 16-23; CompTel Comments at 27-29; KMC Comments at 4-8; Excel Comments at 2-4; Intermedia Comments at 5-6; State Comments at 4-5; WorldCom Comments at 8-11.

[56] Second Annual Report and Analysis of Competitive Market Conditions, FCC 97-75, at 52-55 (March 25, 1997) (quoted in Sprint Comments at 13-14). The Commission re-affirmed this view earlier this year. See id. (citing decision).

[57] AT&T Comments at 78 & Roderick Aff. ¶¶ 6, 9; Excel Comments at 2 ("PCS caters to . . . the special needs for mobility"); KMC Comments at 6 (BellSouth's survey results show that most customers "wanted a mobile option in addition to their wireline service"); Sprint Comments at 16, 24 (same); ALTS Comments at 7; State Comments at 4.

[58] AT&T Comments at 78 & Roderick Aff. ¶ 9 & Hubbard/Lehr Aff. ¶ 64; MCI Comments at 7-10 ("PCS is 'substantially more expensive than wireline service for the great majority of customers' and is priced differently, charging for both outgoing and incoming usage") (quoting DOJ First La. Eval. at 7-8); Sprint Comments at 18-19, 21 ("Most significantly, the prices for PCS (and other CMRS) preclude their use as an effective landline substitute"); State Comments at 5 (refuting conclusions of BellSouth study purporting to find "PCS to be price competitive;" those results apply only to "consumers with very low usage patterns -- less than 4 minutes a day of local calls"); TRA Comments at 20-23 (listing numerous price distinctions between PCS and landline); ALTS Comments at 10 n.9; Excel Comments at 3-4; WorldCom Comments at 8-10.

[59] AT&T Comments at 78, 89 & Roderick Aff. ¶ 6; ALTS Comments at 8-9 n.8 (noting current "inability of PCS to be used for data services"); MCI Comments at 10 (describing "important (continued...)

Although this record is more than enough for the Commission to reject U S WEST's and BellSouth's claims that PCS carriers are "competing providers," BellSouth's data itself is plainly insufficient to meet its burden of proof under the Act. First, even taking the data at face value, they "clear[ly]" show that "the vast majority of consumers do not consider PCS to be a close substitute for wireline local exchange service, and PCS competition alone does not provide the full range of benefits we would expect from competitive local markets."[60] But BellSouth's data, unfavorable as it is to BellSouth, cannot be trusted: the survey that BellSouth conducted was rife with methodological flaws, and cannot be considered valid.[61] For example, the study sample was not randomly selected from all Louisiana consumers, but was self-selected through responses from a BellSouth advertisement, and thus biased in favor of consumers interested in and favorably pre-disposed to PCS.[62] Because of this and other flaws, BellSouth has not

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[59] (...continued)
technical differences that prevent PCS from serving as a substitute for wireline service," including one handset per number); Sprint Comments at 14-16.

[60] DOJ Eval. at 6 n.9; See AT&T Comments at 77; CPI Comments at 20-22 (BellSouth's conclusions about users willing to switch to PCS based only on 13 persons); e.spire Comments at 12 (BellSouth's data show that number of users switching to PCS are "exceedingly small"); MCI Comments at 8 ("Even crediting BellSouth's dubious data," only "0.40 percent of BellSouth's total loops in Louisiana" have been switched to PCS); WorldCom Comments at 10 (BellSouth's study, even with its "artificial sample" of users with a "heightened interest in PCS," still does "not show that PCS is a competitor with wireline services"); ALTS Comments at 6-7; CompTel Comments at 27-29; Excel Comments at 2-4; KMC Comments at 6-7; Sprint Comments at 22-25; State Comments at 4.

[61] See ALTS Comments at 7-8 (noting small sample size); CPI Comments at 17-22 (same; also noting lack of statistical error margins); MCI Comments at 8-9, 11 n.13 (BellSouth's survey used "[l]eading questions," which "generally produce unreliable survey results"); Sprint Comments at 22-24 & n.54 (BellSouth's study question was "poorly worded and ambiguous"); TRA Comments at 23-24 (questions used in study are "vague, confusing, and unlikely to produce meaningful results"); KMC Comments at 6-8.

[62] See, e.g., CPI Comments at 17-19; KMC Comments at 6; MCI Comments at 11 n.13; Sprint (continued...)

produced any sufficient evidence that PCS is today competing with its wireline services, and therefore its application does not qualify under Track A.

III. THE COMMENTS CONFIRM THAT BELLSOUTH AND BSLD CURRENTLY ARE NOT COMPLYING WITH SECTION 272 AND HAVE NOT DEMONSTRATED THAT THEY WILL COMPLY WITH SECTION 272 IF GRANTED INTERLATA AUTHORITY

No commenter disputes the showing made by AT&T, MCI, and Sprint that BellSouth and BSLD, its long distance affiliate, are now violating section 272 in numerous ways, and in no way have demonstrated that they would comply with the requirements of that section if approval were granted. See AT&T Comments at 78-87; MCI Comments at 63-74; Sprint Comments at 60-65. For example, MCI and AT&T showed that BellSouth apparently has not disclosed all past transactions, as the Commission has required. and also has "not disclosed the details of the substance, terms, and conditions of the BST-BSLD transactions that it has reported." MCI Comments at 66; AT&T Comments at 79-82 (also noting failure to post transactions on the internet). And AT&T & Sprint showed that BellSouth has not demonstrated that BSLD's directors are independent or "sufficient[ly]" organized to discharge the "substantial

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[62] (...continued)
Comments at 22; WorldCom Comments at 10. Although CPI makes several apt criticisms of BellSouth's study, its suggestion that a random sample might be compiled by calling at random PCS subscribers is itself problematic. Even if "multiple follow-up attempts" were employed, such a procedure would be much more likely to reach consumers who leave their PCS phones on all the time, and who are precisely the consumers more likely to consider PCS to be a substitute to wireline local service. This method would more often exclude persons (likely a majority of PCS users) who use PCS phones only to make outbound calls and who otherwise turn off their PCS phones, and are not likely to view PCS as a substitute. In all events, it is improper to focus any survey only on PCS users, for the ultimate test is whether Louisiana consumers as a whole would consider PCS to be a substitute. Indeed, BellSouth itself evidently recognized at least some of these limitations, for while it apparently conducted a study using this sort of methodology, see App. D, Tab 14, "Local Alternative Telephone Use Survey," it did not rely on that study in the brief supporting its application.

responsibilities" for "regulatory compliance monitoring" imposed by section 272. Sprint Comments at 60-63; AT&T Comments at 82-84 (also noting lack of any compliance program). In addition, although the Commission wrongly reversed prior holdings and allowed BellSouth to recommend to new customers only BSLD for long distance service, see AT&T Comments at 85-87, BellSouth now "go[es] further" and states that its representatives "will provide a comparison of BSLD services with those of other providers" (Sprint Comments at 64) and will "assist BSLD in the development and creation of packages" of local and long distance service. AT&T Comments at 87. Both activities fall outside the scope of section 272(g) and "exceed[] the bounds of acceptable joint marketing." Sprint Comments at 64. For these, and numerous other reasons, see, e.g., MCI Comments at 67-73; AT&T Comments at 83-84, the Commission should deny BellSouth's application.

IV. THE COMMENTS CONFIRM THAT BELLSOUTH'S ENTRY WOULD NOT BE IN THE PUBLIC INTEREST

Finally, the commenters overwhelmingly agree that BellSouth's entry would not now be in the public interest.[63] In particular, the commenters agree that the public interest inquiry is a vital part of the section 271 approval process -- as vital, in fact, as full compliance with the competitive checklist. See, e.g., Litan/Noll Comments at 4-5. Notably, AT&T agrees that

[63] DOJ Eval. at 40-42 & Schwartz Aff. & Schwartz Supp. Aff.; AT&T Comments at 88-99; MCI Comments at 84-100; WorldCom Comments at 27-33; Sprint Comments at 65-85; e.spire Comments at 36-42; CompTel Comments at 29-33; ALTS Comments at 19-22; Intermedia Comments at 26-28; TRA Comments at 30-46; CPI at 1-31; Litan/Noll Comments at 1-24.

there must be widespread, facilities-based competition that provides a realistic choice of providers to business and residential customers before the public interest test is met.[64]

Once again, however, a few commenters seek to limit the public interest inquiry, or to warp it so that any application would be in the public interest. Thus, a few commenters predictably rely on the familiar refrain that BellSouth's entry into the long distance market is necessary to "induce the long distance carriers to hasten their entry into the local exchange business in Louisiana."[65]

As AT&T and other commenters pointed out,[66] and as the Commission has already

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[64] DOJ Eval. at 41 & Schwartz Aff. & Schwartz Supp. Aff.; MCI Comments at 85-87, 90; Litan/Noll Comments at 16-17. AT&T, however, does not concur with the suggestion of Messrs. Litan and Noll that the Commission should invite ILEC applications on a less-than-statewide basis, i.e., for a particular city. Litan/Noll Comments at 20-23. Indeed, the text of section 271 quite explicitly refers to applications for "in-region States," §§ 271(b)(1), (i)(1), which demonstrates that the Act requires that an application include the entire geographic area in a state. Moreover, allowing applications to be filed only for limited and ILEC-selected areas is inconsistent with the Act's goal that the benefits of local competition should extend to all markets and to all citizens in a state. The Commission therefore should not encourage or allow applications except for an entire state.

[65] Ameritech Comments at 17; Keep America Connected Comments at 3 (arguing that "[c]urrent market incentives have created a rush to provide local service to the business market, but little interest in offering service to the less profitable residential market. We believe that Bell entry will provide a powerful market incentive to serve all consumers . . ."); LPSC Comments at 7-8 (claiming that "the largest interexchange carriers with the technical expertise and financial strength have ignored Louisiana" and that "BellSouth cannot be blamed nor punished if other telephone service providers fail to enter the local markets in Louisiana").

[66] AT&T Comments at 89-90; see also CPI Comments at 25 ("we are not aware of any evidence that competitors are 'going slow,' or delaying their efforts to compete solely to keep BellSouth out of long distance. In fact, BellSouth's argument is counterintuitive"); e.spire comments at 38 (terming BellSouth's argument a "distraction" because "e.spire and other facilities-based carriers have invested heavily in Louisiana. Thus, it is not from any lack of interest on the part of competitors that local competition has not developed more fully in Louisiana. Rather, it is BellSouth that is delaying competition by refusing to . . . open its markets"); MCI Comments at 87-88 (noting that "CLECs with no long distance operations would have no motive to delay BellSouth's entry into long distance" and that, in all events, "MCI and other long distance (continued...)

found, this view is untenable because it erroneously "presumes that BellSouth's local markets are already open to competition" and that BellSouth has in fact done all it reasonably can to open its local markets to competition. South Carolina Order ¶ 25. In reality, BellSouth falls well short of that requirement, and of meeting the competitive checklist, which is why local competition in Louisiana today is still virtually non-existent.

In fact, the lack of significant mass market entry can be linked in particular to BellSouth's longstanding hostility to providing unbundled network elements, and particularly combinations of those elements, for CLECs to employ in providing competitive local services. See DOJ Eval. at xi, 3-4, 8-10 (BellSouth's policies on UNEs "are the most likely explanation for the virtual absence of [UNE-based] competition in Louisiana"). AT&T and other CLECs have long viewed UNE-combination-based entry as the most immediately promising means of serving large volumes of residential and small-business customers. See AT&T Comments, Augier Aff. ¶¶ 5-6, 15-32. Because of BellSouth's entrenched resistance to meeting its obligations to provide network elements, however, UNE-combinations are not now available to CLECs, which has frustrated AT&T's and other CLECs' entry plans, as this Commission has previously found. See South Carolina Order ¶ 75 ("AT&T has made significant efforts to advance its entry strategy . . . but its efforts have been hindered" by policies that have "precluded" the use of unbundled elements, particularly "through a combination," to serve customers). It is therefore no coincidence that market entry in Louisiana has been limited, and

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[66] (...continued)
carriers have many compelling business reasons to want to enter the local market"); Sprint Comments at 75-76 (noting argument of DOJ expert that "'the theory that local entry is delayed primarily due to CLECs' reluctance to trigger approval of BOC interLATA authority is not supported by the experience in states where non-BOC LECs already offer interLATA services"') (quoting Schwartz Supp. Aff, DOJ SC Eval., No. 97-208).

that where it has occurred, it has been only through resale or, to an even lesser extent, through CLECs' own facilities. See DOJ Eval. at xi, 3-4.[67]

The LPSC offers one other argument that also entirely misreads the public interest test. The LPSC, echoing BellSouth, claims that granting BellSouth's application would produce significant consumer benefits to Louisiana consumers by providing Louisianans with "an additional choice" for long distance service. LPSC Comments at 8-9. As the Justice Department explains, however, BellSouth's claims of public benefit "rest[] on the erroneous contention that the 'public interest' test should only consider the state of competition in long distance markets" and largely ignore the "more substantial" competitive benefits from requiring that BellSouth's "local markets be opened before allowing interLATA entry." DOJ Eval. at xii, 40-42. Because the benefits from opening the BOCs' local markets to competition will substantially exceed the benefits to be gained from more rapid BOC participation in in-region long distance markets and because BellSouth's cooperation will be essential to opening its markets, granting BellSouth's application is not in the public interest.

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[67] Moreover, as Sprint and WorldCom point out, competition is also impeded by the inflated access charges that BellSouth charges to IXCs. Sprint Comments at 83-85; WorldCom Comments at 31-33; see also Pennsylvania ALJ Access Reform Decision at 74 ("Without access reform, it would be unreasonable to allow [the BOC] into the interLATA toll market, or to declare the intraLATA market competitive"). AT&T concurs with Sprint and WorldCom that 271 relief should be predicated on access reform to remove the unfair cost advantage that BellSouth would receive under the current structure.

CONCLUSION

For the reasons stated above and in AT&T's initial comments, BellSouth's second section 271 application for Louisiana should be denied.

Respectfully submitted,

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